NO. 18890

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CECILIA E. SOULE, Executrix of the Estate of WALTER N. SOULE, Deceased, Appellant, vs. KAHULUI RAILROAD COMPANY, Appellee.	)

REPLY BRIEF FOR APPELLANT

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Estate of Walter N. Soule, Deceased.

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SUBJECT INDEX

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ARGUMENT

This Reply Brief is directed at a portion of Appellee's Answering Brief (pp. 12-15).

Appellant, Soule, seeks to join Appellee, Kahului Railroad Company, as a third party defendant to an action in the Second Circuit Court of the State of Hawaii brought by the Toyofuku claimants against Soule and others. The Toyofuku action is based on the State of Hawaii wrongful death and survival statutes. Tungus v. Skovgaard, 358 U.S. 588, 71 ALR2d 1280 (1959). Appellee ignores this fundamental consideration, and argues that these Hawaii statutes, which are the basis for the Toyofuku action, should be ignored by this Court.

Appellee next argues that the Jones Act remedies are exclusive and that "There is no cause of action against the

employer based upon the doctrine of unseaworthiness..." (p. 12 Ans. Brief). This is not correct.

> "It is entirely clear that Congress did not intend the Jones Act to be an all-inclusive statute, stating the only ground of personal injury recovery for seaman against ship-owner-employer. The Supreme Court was undoubtedly correct in concluding that by the Jones Act Congress had meant to leave the pre-statutory unseaworthiness remedy intact and merely to add a remedy, previously not available, for injuries resulting from operating negligence." Gilmore and Black, The Law of Admiralty (1957), Section 6-34, p. 308. See also, Id., Sections 6-23 and 6-38.

Appellee attempts to use its argument relative to the exclusive nature of the Jones Act remedy as a stepping stone leading to its unarticulated conclusion that Kahului Railroad Company cannot be joined as a third party defendant to the

Toyofuku action because the courts of the State of Hawaii cannot hear actions arising under the Jones Act. This is not correct. There is no such doctrine of preemption.

> "It is clear that the state courts have jurisdiction concurrently with the federal courts to enforce the right of action established by the Merchant Marine Act as a part of the maritime law." Engel v. Davenport, 271 U.S. 33, 37 (1926). Compare, Dowd Box Co. v. Courtney, 368 U.S. 502,507 (1962).

If the liability of the Kahului Railroad Company to the Toyofukus is based on the Jones Act, the courts of the State of Hawaii can hear the matter, subject, of course, to the ultimate, overriding power of admiralty to limit the shipowner's liability.

Finally, Appellee argues that, in any event, even though the matter ~~was~~ be litigated in the state court, the Hawaii statutes relative to the liability of joint and several tort-feasors and contribution would not be applicable, for the federal law on the subject would apply (p. 15 Ans. Brief). Appellee cites no authority of any kind for this proposition. Nor does Appellee offer any reason why in this "choice of law" situation "federal law" should apply.

Appellee offer any reason why in this "choice of law" situation,
"lex fori" should apply.

More importantly, however, Appellee fails to indicate what the applicable "federal law" is. There is no "choice of law" problem if there is no conflict. Absent some statement of the "federal law", are we certain a conflict exists?

At root, Appellee fails to understand the fundamental premise that the State and Federal Governments have a concurrent responsibility for the development of maritime law.

> "Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789." Romero v. International Terminal Operating Co., 358 U.S. 354, 374 (1959)

Accordingly, this Court must decide whether the interest of the State of Hawaii in affording Soule every opportunity available under the laws of the State of Hawaii to defend herself outweighs the narrow interest of the shipowner in confining the litigation arising out of the casualty to a single forum. This is the problem.

Dated at Wailuku, Maui, Hawaii, this 25th day of February, 1964.

Respectfully submitted,

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I CERTIFY THAT, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. Crockett